Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

KATHERINE T. WALLACE, PH.D.,
Petitioner,
v.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, ET AL.,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,
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QUESTIONS PRESENTED

1. Whether the Superior Court of the District of Columbia is a "court of the United States" for purposes of the federal obstruction of justice statute, 18 U.S.C. § 1503, such that allegations of obstruction of justice in the D.C. Superior Court constitute predicate acts under the civil provisions of the Racketeer Influenced and Corrupt Organizations ("RICO") Act?

2. Whether the Superior Court of the District of Columbia is a "court of the United States" making a Superior Court proceeding an "official proceeding" under the federal witness tampering statute, 18 U.S.C. § 1512, such that allegations of obstruction of justice in the D.C. Superior Court constitute predicate acts under the civil provisions of the RICO Act?

3. Whether a Complaint must prove, corroborate, substantiate and/or provide evidence of corrupt intent in order to state a claim for bribery under 18 U.S.C. § 201(b) and (c), as a predicate act under the civil provisions of the RICO Act?

4. Whether Defendants' private ex parte telephone conference with the district judge's chambers the day after filing their Motion to Stay Plaintiff's Motion for Partial Summary Judgment, in which Defendants requested an Order regarding such motion to stay, which Order the district judge then granted and immediately faxed to Defendants, relieving them of responding to Plaintiff's motion, and the failure of Defendants and the district court to disclose such ex parte communication, violated Petitioner's due process rights and created an appearance of impropriety requiring recusal of the trial judge and reversal of the trial judge's subsequent orders?

PARTIES TO THE PROCEEDING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Katherine T. Wallace appeared as Appellant in the Court of Appeals.

The following parties appeared in the Court of Appeals as Appellees: Skadden, Arps, Slate, Meagher & Flom LLP; Paul, Hastings, Janofsky & Walker LLP; Epstein, Becker & Green, P.C.; Morgan, Lewis & Bockius LLP; Thomas J. Schwarz, Antoinette Cook Bush, Henry P. Baer, Thomas J. Casey, Robert S. Lighthizer, John J. Mangan, Neal S. McCoy, Janet L. Goetz, Richard L. Brusca, Richard A. Hindman, Ellen Lyons, Barbara Berish Brown, Ellen C. Rice, Glenn Merten, Abbey G. Hairston, Grace E. Speights, Linda L. Rickman, William F. Gould, John J. Burke, Tracey DeVaux, David Scott Nance, Simone Wu and Alicia L. Batts.

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CITATIONS OF OPINIONS AND ORDERS OF LOWER COURTS

The relevant opinions and orders of the court of appeals and the district court are unreported, but are included here in the Appendix to this Petition ("Pet. App."). The judgment of the court of appeals is at Pet. App. at A2-A3. The district court's Memorandum Opinion is included here at Pet. App. at A4-A14. The district court's accompanying Order stands at Pet. App. at A15-A16. The court of appeals' orders denying petitions for panel rehearing and rehearing en banc stand at Pet. App. A17 and A18, respectively.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit in Wallace v. Skadden Arps et al., 99-7199, affirming the district court's dismissal of the First Amended Complaint (Pet. App. at A33-A70), in its entirety was entered May 18, 2000. Petitioner, Katherine T. Wallace filed timely petitions for panel rehearing and rehearing en banc. Both petitions were denied on July 21, 2000. Consequently, this Court has jurisdiction to review the Court of Appeals' judgment on writ of certiorari pursuant to 28 U.S.C. §1254(1) which authorizes Supreme Court review of civil judgments of United States Courts of Appeals upon grant of a petition for writ of certiorari.

CITATION OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS PETITION

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STATEMENT OF THE CASE

This case arises from Respondents' actions in two related cases brought by Petitioner Katherine T. Wallace, Ph.D., in the Superior Court of the District of Columbia against Respondent Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden Arps") and certain of its partners and employees. In those cases, Skadden Arps made financial offers to all ten third-party witnesses subpoenaed by Petitioner for deposition, seeking to influence such witnesses' testimony by itself representing those witnesses at their depositions or paying its hired lawyers or other lawyers to do so. Petitioner is an attorney and a member of the Bar of the District of Columbia and the Bar of this Court. Respondents are defendants in the Superior Court actions, the attorneys who participated in soliciting witnesses and witnesses who accepted the financial offers. All Respondents, with the exception of Linda L. Rickman and Tracey DeVaux are either law firms operating in the District of Columbia or lawyers who belong to its Bar or the New York Bar.

Petitioner was employed as an associate in the Washington, D.C. office of Skadden Arps from September 1993 until September 1995, when her employment was terminated. Dr. Wallace subsequently filed two lawsuits against Skadden Arps in the D.C. Superior Court: one alleging defamation, the other alleging violations of the D.C. Human Rights Act. Each case was separately dismissed. Dr. Wallace appealed and on January 15, 1998 the District of Columbia Court of Appeals reversed the Defamation Case in part, and reversed the Human Rights Case in its entirety.

On remand, the parties agreed that any discovery taken in either case would be applicable to both cases. However, Petitioner's efforts to fairly conduct discovery in those two lawsuits by securing the testimony of third-party fact witnesses was thwarted and tainted by Skadden Arps and its lawyers who sought to directly influence and control the testimony of those third-party witnesses before and during their testimony under oath.

Respondents Janet L. Goetz and Richard Brusca are Skadden Arps partners who, with associate Ellen Lyons,

represented Skadden Arps before the two cases were remanded. In February, 1996 Dr. Wallace subpoenaed Timothy Robinson for deposition, after which Brusca contacted Robinson and offered to represent him for free at his deposition. Robinson declined, but Lyons contacted him again and repeated the offer. Robinson again declined and was deposed.

On remand, Skadden Arps hired Respondent Paul, Hastings, Janofsky & Walker LLP ("Paul Hastings"), including Respondents Barbara Berish Brown, Ellen C. Rice and Glenn Merten as defense counsel. Petitioner Abbey G. Hairston, then partner in Epstein, Becker & Green, P.C. ("Epstein Becker") was also added to the defense team. Respondent Thomas J. Schwarz, Skadden Arps partner and Litigation Practice Leader acted as client representative.

Skadden Arps' efforts to control witness testimony continued after remand, with the Skadden Arps partner, Respondent Antoinette Cook Bush, a defendant in the Superior Court cases, and/or the newly hired lawyers contacting each and every subpoenaed third-party witness, in some cases multiple times, in order to convince such witnesses to accept Skadden Arps' offer of free legal services, in exchange for allowing Skadden and its lawyers to directly influence the third-party witnesses' sworn testimony. Skadden Arps, either through Bush or its counsel offered each subpoenaed third-party witness free legal services paid for by them, provided by their lawyers, in return for their agreement to allow Skadden Arps, through counsel and otherwise, to influence their sworn testimony. According to Appellees' Brief before the D.C. Circuit, all ten witnesses subpoenaed by Petitioner were made such offers, "five chose to be represented by attorneys then representing Skadden, Arps, three selected counsel of their own (whom [Skadden Arps] then paid), and two chose to be unrepresented." Appellees' Brief at 2. In fact, Respondent Simone Wu chose to be represented by separate counsel paid for by Skadden Arps as well as Skadden's hired attorney, Brown. Respondents William Gould, John Burke, Tracey DeVaux, Linda Rickman, and David Scott Nance are also third-party witnesses who accepted Skadden Arps' offers and allowed influence of their testimony under oath.

Not only did the same lawyers who represented the Defendants represent these six third-party fact witnesses at their sworn depositions, but the Defendants' lawyers instructed those third-party witnesses regarding their testimony before and during such depositions, including instructing each of them not to answer certain questions posed during the depositions. The witnesses complied with Skadden Arps' instructions.

In addition, Skadden Arps and its lawyers repeatedly caused delays and prevented witnesses' appearance for deposition. Despite agreeing otherwise, Skadden Arps' refused to allow the deposition of Respondent Alicia L. Batts on the scheduled date. Batts along with her counsel, Respondent Grace Speights of Morgan, Lewis & Bockius LLP complied with Skadden Arps' instructions not to appear. Several other third-party witnesses were instructed not to appear for subpoenaed depositions and complied with such instructions, some of them canceling several times at Skadden Arps' behest.

Subject matter jurisdiction for the district court was established by 28 U.S.C. § 1331 which provides the U.S. district courts with original jurisdiction of any civil action arising under the laws of the United States and by 18 U.S.C. § 1964(c), which authorized the civil action below, in order that Plaintiff recover damages suffered to her business and property through Defendants' alleged pattern of racketeering activity and conspiracy to commit racketeering, as outlawed by 18 U.S.C. § 1962 (c) and (d), respectively.

On August 10, 1998 Dr. Wallace filed the Complaint, Demand for Judgment and Demand for Jury Trial in the United States District Court for the District of Columbia, alleging a pattern of racketeering activity, including 48 counts of bribery, witness tampering, obstruction of justice and conspiracy to commit racketeering. Plaintiff filed the First Amended Complaint on August 25, 1998. Pet. App. at A33-A70. On September 9, 1998 Dr. Wallace filed a Motion for Partial Summary Judgment, seeking resolution of 38 of the 52 counts in the First Amended Complaint. The 53 supporting exhibits included deposition testimony of the third-party witnesses in which lawyers represented the Defendant Skadden Arps as well as the witness

and, in which those lawyers - on the record - instructed those witnesses regarding their testimony, including instructions not to answer questions posed.

On the same day that Dr. Wallace filed her Motion for Partial Summary Judgment, Defendants filed a Motion to Dismiss. One week later, on September 16, 1998 Defendants filed a Motion to Stay Plaintiff's Motion for Partial Summary Judgment. The following day, September 17, 1998 unbeknownst to Dr. Wallace, certain Defendants and their counsel held an ex parte telephone conference with Judge Kollar-Kotelly's chambers to discuss the issuance of an order regarding Defendants' motion to stay, filed the day before. Later that day, upon Defendants' request, the district court issued an Order relieving Defendants' of the requirement of responding to Plaintiff's Motion for Partial Summary Judgment and sent it to Defendant Paul Hastings' offices via facsimile, effectively granting Defendants' motion for stay before Plaintiff had received or responded to the motion. Dr. Wallace timely opposed Defendants' motion to dismiss, incorporating and attaching the evidence submitted in support of her Motion for Partial Summary Judgment and opposed Defendants' motion for stay.

A year later, on September 13, 1999, the district court dismissed the First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, refusing to consider the evidence Plaintiff submitted in opposition and granting Defendants' motion for attorneys' fees and costs. Pet. App. at A4-A14. The district court found that the facts alleged were undisputed and only the motivation behind Defendants' actions was in dispute. Id. at A5. It ruled that the First Amended Complaint failed to properly plead the predicates of bribery, obstruction of justice and witness tampering. In particular, the district court ruled that the Complaint's bribery allegations failed to prove or provide evidence of corrupt intent. Id. at A8-A9. The district court further found that the charges of witness tampering and obstruction would not lie because the alleged activities took place in the D.C. Superior Court, which it found was not a "court of the United States." Id. at A10-A12.

Neither Plaintiff's Motion for Partial Summary Judgment

(the district court never ordered Defendants to respond) nor Defendants' Motion for Stay were considered on their merits. Both were denied as moot, effectively suppressing the evidence supporting Plaintiff's claims. Id. at A15.

Dr. Wallace timely filed a notice of appeal on September 22, 1999. On September 28, 1999 Defendants filed the Affidavit of E. Lawrence Barcella in Support of Award of Attorneys' Fees and Costs and supporting exhibits. This fee affidavit was not served on Petitioner until January 5, 2000 after Petitioner discovered it while reviewing the docket in preparation for appeal.

That affidavit provides sworn testimony and documentary evidence that Defendants held an ex parte conference with Judge Kollar-Kotelly's chambers regarding an Order to be issued on their Motion for Stay on the same day that such an order was issued granting a de facto stay.

Petitioner raised this issue on appeal as an appearance of impropriety, requesting that the case be assigned to a different district judge on reversal and, requesting that the Court of Appeals conduct an appropriate investigation. In its order affirming the district court's dismissal without opinion, the D.C. Circuit stated that it found no impropriety and no evidence of bias. Id. at A2-A3.

ARGUMENT

I. BECAUSE THE QUESTION OF WHETHER THE D.C. SUPERIOR COURT IS A "COURT OF THE UNITED STATES" UNDER THE FEDERAL OBSTRUCTION STATUTE IS A QUESTION NEVER DECIDED BY ANY COURT OF APPEALS AND BECAUSE THE D.C. CIRCUIT DECLINED TO ISSUE AN OPINION IN THE PROCEEDINGS BELOW, THE SUPREME COURT SHOULD GRANT CERTIORARI ON THIS ISSUE.

This petition presents a compelling case for a grant of certiorari. First, it presents two related issues of first impression which no court of appeals has decided. Under Rule 36 of the United States Court of Appeals for the District of Columbia Circuit, such a question should be decided in a published opinion.

D.C. Circuit Rule 36(a)(2)(A). Yet, the Court of Appeals declined to do. Second, the petition presents several questions that go to the heart of fundamental fairness and integrity of judicial proceedings in the courts of the United States, both in the Superior Court of the District of Columbia and United States District Court for the District of Columbia. Indeed, the petition touches on nearly every element necessary for the due administration of justice. It asks that the Court define and delineate the roles and relationships among parties, lawyers, judges and witnesses, all of which have been muddled and compromised by the proceedings giving rise to the original complaint as well as the proceedings in the district court below.

The questions raised by this petition are exceptionally important because in addition to their inherent gravity, the D.C. Circuit's affirmance without opinion conflicts with pertinent decisions of this Court, of the D.C. Circuit itself and of authoritative decisions of Courts of Appeals in other circuits. The issues presented are fundamental to the integrity of the judicial system, such that they require consideration by this Court, both to resolve unsettled questions of importance and to exercise its supervisory power over the lower courts. This Court should therefore grant certiorari.

A. The D.C. Circuit's Failure To Publish An Opinion Construing The Term "Court of The United States" Under Title 18 Leaves A Confusing Legal Landscape That Should Be Resolved By This Court.

The Racketeer Influenced and Corrupt Organizations Act ("RICO") imposes criminal and civil liability upon those engaged in certain "prohibited activities." Section 1964 prescribes the civil remedies for engaging in such prohibited activities and authorizes "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue in any appropriate United States district court. 18 U.S.C. § 1964(c) (1998).

Section 1962 provides in pertinent part that:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. 1962(c) and (d) (1998).

In order to have a claim under RICO's civil provisions, the complaint must plead a pattern of racketeering activity. Section 1961 defines the so-called predicate acts of "racketeering activity," to mean any act indictable under certain enumerated sections of Title 18, including sections 201, 1503 and 1512, the federal bribery, obstruction of justice and witness tampering statutes, respectively. 18 U.S.C. § 1961 (1998). The First Amended Complaint filed in the district court alleged violations of these three statutes as predicate acts of civil RICO. However, the district court ruled and the D.C. Circuit affirmed that section 1503 was inapplicable to the acts complained of because the D.C. Superior Court was not a "court of the United States." Pet. App. at A11.

The question as to whether congressionally created, non-Article III courts are subject to the prohibitions set out in section 1503 of Title 18, has been raised numerous times in district courts. This issue has only once been addressed by any United States Court of Appeals. In United States v. George, 625 F.2d 1081 (3d Cir. 1980), the Third Circuit decided that the District Court of the Virgin Islands was a territorial court and therefore not a "court of the United States." Congress overruled this decision with its passage of 18 U.S.C. § 23 in 1994, which specifically includes the District Court of the Virgin Islands and other territorial courts in the definition of "court of the United States," overruling the result in United States v. George. See also 18 U.S.C. § 23. (1999).

However, the precise question of whether the D.C. Superior Court is such a court, is an issue of first impression that

has not been resolved by any United States Court of Appeals. In its Memorandum Opinion which the D.C. Circuit affirmed without opinion, the district court relied on United States v. Smith, 729 F. Supp. 1380 (D.D.C. 1990), which interpreted "section 1503 to require that 'proceedings must in fact be federal for the charge [obstruction of justice] to lie.'" Pet. App. at A11. (citing Smith, 729 at 1386). However, there is no authority in this context which defines the term "federal" to exclude the local courts of the Federal District. Indeed, there are strong indications to the contrary.

In 1970, the Congress enacted the District of Columbia Court Reform and Criminal Procedure Act which created the Superior Court. It states:

> The judicial power in the District of Columbia is vested in the following courts:
>
> (1) The following Federal Courts established pursuant to article III of the Constitution:
>
> (A) The Supreme Court of the United States.
>
> (B) The United States Court of Appeals for the District of Columbia Circuit.
>
> (C) The United States District Court for the District of Columbia.
>
> (2) The following District of Columbia courts established pursuant to article I of the Constitution:
>
> (A) The District of Columbia Court of Appeals.
>
> (B) The Superior Court of the District of Columbia.

D.C. Code § 11-101 (1998). The plain language and structure of the statute indicate that the District of Columbia Court of Appeals and Superior Court of the District of Columbia are courts of the United States established by Congress pursuant to its Article I powers. The district court's ruling and the cases upon which it

relied thus contradict the plain meaning of the statute.

Moreover, the line of cases interpreting the term "court of the United States" under section 1503 is marked by a failure of analysis and inconsistent reasoning. In Smith, for example, cited by the district court, the defendant moved to dismiss his indictment under section 1503. 729 F. Supp. at 1385-1836. There, the district court relied solely United States v. Regina, 504 F. Supp. 629, 631 (D. Md. 1980), without opposition from the Government, for the proposition that the Superior Court of the District of Columbia is not a "court of the United States." Id. However, that was not the principal reason for the dismissed indictment. Indeed, the court there did not examine the Regina decision's reasoning. Rather, in deciding to dismiss, the Smith court held "that no 'judicial' proceedings were pending at the time of defendant's conduct . . . ." as required by section 1503. Id. at 1386.

Notably, the reasoning in Regina is self-contradictory. There, the court ruled that the Superior Court of the District of Columbia was not a "court of the United States" as required by 18 U.S.C. § 1503, relying on two cases involving the courts in United States territories: United States v. Bell, 108 F. Supp. 777 (D.C. Alaska 1952), which held that the District Court of the Territory of Alaska was not a court of the United States under 18 U.S.C. § 1503; and George, 625 F.2d at 1081, which, relying on Bell, held the same regarding the District Court of the Virgin Islands. Regina 504 F. Supp. at 631.

In particular, the Regina court purported to adopted the George analysis, which rested its decision on the institutional classification of "federal, state or territorial," rather than the court's jurisdiction or powers. Id. (citing George, 625 F.2d at 1089). Yet, the Regina court did engage in a jurisdictional analysis, comparing the Superior Court to both territorial and state courts. The court found that the Superior Court, like the District Court of the Virgin Islands "is not an Article III court," and "cannot be classified as a federal court," but concluded, based on a jurisdictional analysis, that the Superior Court was a local court "with jurisdiction equivalent to that of state courts." Id. In so doing, the Regina court ignored the Third Circuit's reasons for

deciding that District Court of the Virgin Islands was a territorial court.

By contrast, in George, the court examined the origins of the District Court of the Virgin islands in determining its institutional nature. According to George, the District Court of the Virgin Islands was originally created in 1921 to supersede the formal Danish courts, through ordinances adopted by the colonial councils of St. Croix and, St. Thomas and St. John. 625 F.2d at 1087-1088. The Third Circuit thus concluded "'that the present District Court for the Virgin Islands is the direct successor to the district court which was created for the Virgin Islands by the municipal ordinances of 1921. . . . It is thus clear it is a territorial court, . . .'" Id. at 1088.

However, the Superior Court is neither state nor territorial. The court in Regina, in addition to its failure to adhere to the George analysis, failed to address the distinctions between the courts of the District of Columbia and territorial courts. It failed to examine the Superior Court's nature and origins. Thus, Smith's reliance on Regina and the district court's reliance on Smith both appear to be misguided. The D.C. Circuit similarly failed to address such distinctions, despite the fact that Circuit Rule 36 provides that questions of first impression should be resolved in a published opinion. See D.C. Circuit Rule 36(a)(2)(A). Therefore, this Court should grant certiorari to resolve these important questions.

B. This Court Should Clarify The Status of The District of Columbia's Courts in The Context of Title 18 and specifically, sections 1503 and 1512 Et Seq.

The precise nature of the District of Columbia's courts has been an issue since the District was established as the seat of government. This Court has often emphasized the distinction between territorial courts and the courts in the District of Columbia. In so doing, it consistently examined the nature and origins of the District and its institutions. See e.g. O'Donoghue v. United States, 289 U.S. 516 (1933). In O'Donoghue, this Court

explained that territorial courts are "legislative" courts created "under Art. IV § 3, cl. 2 of the Constitution vesting in Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; . . .'" Id. at 535. For reasons of their status as putative states, territorial governments are "temporary, " "ephemeral" and of "impermanent character." Id. at 538. On the other hand, this Court stated:

> How different are the status and characteristics of the District of Columbia! The pertinent clause of the Constitution (Art. I, § 8, cl. 17) confers the power on Congress to "exercise exclusive legislation . . . over such district . . . as may . . . become the seat of government of the United States."

Id. at 538 (quoting U.S. Const. Art. I, § 8, cl. 17).

It is this power, conferred by the Constitution's District Clause, that Congress exercised in creating the Superior Court as well as its predecessor Courts in the District of Columbia. With respect to such a predecessor court, the Supreme Court of the District of Columbia, created pursuant to the same power, this Court explained:

> The power to prescribe what effect shall be given to the judicial ~~proceedings~~ of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, [and] which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States . . . That the Supreme Court of the District of Columbia **is a court of the United States, results from the right of exclusive legislation over the District which the Constitution has given to Congress**.

Embry v. Palmer, 107 U.S. 3, 30-31 (1882) (Emphasis added). See also Callan v. Wilson, 127 U.S. 540 (1880) (finding that the

Supreme Court of the District of Columbia is a "court of the United States"); Benson v. Henkle, 198 U.S. 1 (1905) (same); James v. United States, 202 U.S. 401, 407 (1906) (same); Cross v. United States, 145 U.S. 571, 576 (1892) (same).

Moreover, neither the creation of such courts pursuant to the District Clause of the Constitution, nor the litigation of matters considered local in character, civil or criminal, appears to bear on their status as "courts of the United States." In Embry, for example, the underlying issue was one of contract and quantum meruit for services rendered, a matter normally considered local, rather than federal. Even for such purposes, the judgment of the Supreme Court of the District of Columbia was held to be a judgment of a court of the United States, precisely because such court was established pursuant to congress's Article I powers. 107 U.S. 30-31.

The reasoning in Embry adds an additional element to the question under consideration. On the one hand, this Court, more than one hundred years ago, decided the question regarding the status of the District of Columbia's courts based on constitutional grounds, yet the recent district court decisions do not address the constitutional issue or the Superior Court's constitutional origins in the context of section 1503. On the other hand, the Third Circuit's institutional analysis in George, - federal, state or territorial - may be helpful, but has been misinterpreted by the district courts attempting to follow it. All of this creates confusion surrounding the Superior Court's status for section 1503 purposes. This Court should therefore grant certiorari to definitively settle this question.

II. BECAUSE THE APPLICABILITY OF SECTION 1512 TO PROCEEDINGS IN THE D.C. SUPERIOR COURT ALSO TURNS ON THE UNRESOLVED DEFINITION OF THE TERM "COURT OF THE UNITED STATES" UNDER TITLE 18, THIS COURT SHOULD GRANT CERTIORARI.

As with section 1503, the propriety of the pleadings alleging violations of 18 U.S.C. § 1512 as RICO predicate acts in

the First Amended Complaint turns on the definition of the term "court of the United States." This too, is an issue of first impression for this Court, with no appellate decisions precisely on point. Moreover, as with section 1503, the cases interpreting the term "official proceedings" under section 1512 have rendered only confusing results. For this reason and for all the reasons above regarding section 1503, this Court should grant certiorari to resolve this question.

Section 1512(b) of Title 18 provides in part:

> (b) Whoever knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--
> (1) influence, delay or prevent the testimony of any person in an official proceeding;
> (2) cause or induce any person to--
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
> (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
> (D) be absent from an official proceeding to which such person has been summoned by legal process; . . .
> . . .
> shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1512(b) (1998).

The district court's decision below, which was affirmed without opinion by the Court of Appeals, determined that the alleged tampering did not involve an "official proceeding," as required by sections 1512 and 1515(a) of Title 18, because it took place in the D.C. Superior Court. Its ruling relied solely on United States v. Allen, 729 F. Supp. 120, 121 (D.D.C. 1989). That case involved a charge of witness tampering in a Superior Court grand jury proceeding. The court concluded that the threatened Superior

Court proceeding did not fall within the definition of "official proceeding" for purposes of 18 U.S.C. § 1512(b). Id.

Section 1515(a)(1) defines the term "official proceeding" as:

> (A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge a judge of the United States Tax Court a special trial judge of the Tax Court, a judge of the United States Claims Court or a federal grand jury;
> (B) a proceeding before Congress; or
> (C) a proceeding before a Federal Government agency which is authorized by law;

18 U.S.C. 1515(a) (1).

The court in Allen concluded that "the D.C. Superior court is clearly not within this definition." Id. In so doing, the Allen court relied on decisions construing section 1512's applicability to military court martial and to state court proceedings, respectively. Id. (citing United States v. Ford, 641 F. Supp. 704 (D.S.C. 1986); Park Assoc. v. Fishbein, 616 F. Supp. 1108 (S.D.N.Y.), aff'd 800 F.2d 1128 (2d Cir. 1986)). Neither the district court, nor the Allen court considered the reasoning of these decisions or their applicability to the courts of the Federal District. Neither the district court nor the Allen court considered whether a proceeding in a court created by Congress and given judicial power in the seat of the United States government, could constitute a proceeding before a "court of the United States," as defined in Section 1515(a)(1)(A). Rather, the Allen court upheld the indictment under section 1512, because the defendant was allegedly trying to prevent or influence testimony related to a federal firearm charge, which it found constituted an official proceeding regardless of whether the indictment was returned in the Superior Court or the United States District Court. Id. at 122. (citing Hackney v. United States 389 A.2d 1336, 1339 (D.C. 1977)). In this case, by contrast, neither the district court nor the Court of Appeals made any analysis at all.

Plainly, the "official proceeding" analysis specific to

military and state courts is inapplicable to the courts in the District of Columbia.

A closer look, however, undercuts the validity of Allen's conclusion that a proceeding in the Superior Court is not an "official proceeding" under section 1512. In United States v. Ford, cited in Allen, the defendant was charged with intimidating a witness under section 1512, because he allegedly attempted to influence testimony in a court martial. 641 F. Supp. at 704. The court dismissed the charge, reasoning that a court marital is not an "official proceeding." The court there construed the term "court of the United States," to be limited to Article III courts. Id. at 705.

First, the Ford determination is at odds with this Court's decision in Embry, which found that an Article I court of the District of Columbia was a "court of the United States." 107 U.S. at 30-31. Moreover, the result in Ford also contrasts with Fourth Circuit's decision in United States v. Clift, 834 F.2d 414 (4th Cir. 1987). There, it was determined that section 1512 was applicable to the hearing held to determine if charges warrant a court martial. According to the Fourth Circuit, the hearing was an "official proceeding" before a Federal Government Agency, namely the department of Defense. Id. at 416. Thus, the decision of the district court in this case, which relied on district court decisions in Ford and Allen, is called into question by stronger authority, the appellate decision in Clift and this Court's historic decision in Embry. Consequently, the court of appeals judgment affirming the district court raises questions and answers none.

The cases attempting to define the term "official proceeding" under section 1512 demonstrate that the issue is not one of settled law. Neither is it settled law that the District of Columbia Superior Court is not "a court of the United States," under 18 U.S.C. § 1503, nor that a proceeding in it does not constitute an official proceeding before "a court of the United States," for purposes of Section 1512.

These unresolved questions were presented to the D.C. Circuit in the appeal below, but that court declined to address the controversy or offer any explanation for its affirmance of the district court's ruling. Its failure to do so, in light of the fact that these questions have never been addressed by any United States

court of appeals, is a departure from the Circuit's policy regarding publishing decisions on issues of first impression, as expressed in Rule 36(a)(2)(A) of the D.C. Circuit Rules. Because this is so and because these issues of first impression have received uneven and contradictory treatment by the district courts, they should be settled by this Court on grant of certiorari.

III. IN AFFIRMING THE DISTRICT COURT'S MEMORANDUM OPINION, THE D.C. CIRCUIT HAS SANCTIONED THE DISTRICT COURT'S RULING THAT A COMPLAINT MUST PROVE, CORROBORATE, SUBSTANTIATE AND PROVIDE EVIDENCE OF CORRUPT INTENT IN ORDER TO STATE A CLAIM FOR BRIBERY AS A PREDICATE ACT OF CIVIL RICO, A DEPARTURE SO FAR AFIELD FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS THAT THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO EXERCISE ITS SUPERVISORY POWERS OVER THE LOWER COURTS.

A. In Testing The Legal Sufficiency Of The First Amended Complaint, The District Court Failed to Accept Its Allegations As True, As Required By Rule 12(b)(6).

It is well settled that in reviewing a Rule 12(b)(6) motion to dismiss a complaint,: "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, (1957). The complaint must be "liberally construed in favor of the plaintiff," who must be granted the benefit of all inferences that can be derived from the facts alleged. Consequently, in reviewing a complaint, courts must accord it the spacious interpretation prescribed by the Federal Rules. Id.

In ruling that the First Amended Complaint failed to properly plead the elements of bribery under section 201, the

district court wrote:

> As Defendants correctly point out, however, "[i]n support of her bribery allegation, Plaintiff claims only that cost-free legal representation was offered, provided, requested and received in return for influencing or otherwise impacting testimony." Never in her Amended Complaint does Dr. Wallace explain how Skadden's provision of this free representation to its subpoenaed former employees *per se* constitutes a corrupt act. Rather, she seems to infer a corrupt motive from the fact that Skadden offered free legal services, and simultaneously to assume that such an offer is necessarily corrupt. (Footnote omitted).
>
> Dr. Wallace fails to provide any corroboration of Defendants' putatively corrupt intent or of the fact that any influence of witness testimony was sought or achieved by Defendants, together or separately.

Pet. App. at A9 (quoting Defendants' Motion to Dismiss). In a footnote, the district court further pointed out that "[i]nstead of providing evidence of a corrupt motive, Dr. Wallace makes conclusory statements. . . ." Id. n.4.

In light of the ruling here, the Court of Appeals' reliance on Conley in affirming the district court is misplaced. First, the district court plainly acknowledged that Plaintiff alleged all the necessary elements of bribery: that something of value was offered, provided, requested and received in return for and with the intent of influencing testimony. The court found that "the facts in this action are not in dispute. Rather, the parties dispute why certain events occurred, and what those events signify with respect to Defendants' motive." Pet. App. at A5. Yet, it failed to correctly apply the standards for a motion to dismiss, which require the court to accept the complaint's factual allegations as true. See Leatherman v. Tarrant Cty. Narcotics Unit, 507 U.S. 163, 164 (1993) (citing United States v. Gaubert, 499 U.S. 315, 327 (1991)).

Rather than accepting the allegations of corrupt intent as true for the purposes of the 12(b)(6) motion, the district court required Dr. Wallace to "prove," "explain," provide

"corroboration of Defendants' putatively corrupt intent [and] the fact that any influence of witness testimony was sought [and] achieved," "provid[e] evidence of a corrupt motive" and "substantiate the claim that the offer of cost-free legal services was tendered 'with the intent of influencing [] testimony under oath."[1] Pet. App. at A9.

However, it is well-settled, if not set in stone, that a court may not evaluate proof, corroboration, substantiation or evidence in determining the legal sufficiency of a complaint. It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact. See Whelan v. Abell, 48 F.3d 1247, 1252 (D.C. Cir. 1995). The factual question of intent is peculiarly within the jury's province. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (Black, J., concurring in the judgment). The Memorandum Opinion makes clear, however, that the district court raised the legal bar beyond that which is applicable to a motion to dismiss.

In Conley and its progeny, this Court has made clear that the Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim, but a short plain statement of the claim that will give the defendant fair notice of

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[1] The district court's further conclusion "that RICO's breadth does not reach the activities" alleged, Pet. App. A14, conflicts with the Third Circuit's decision in Malley-Duff & Assoc., Inc. v. Crown Life Ins. Co., 729 F.2d 341 (3d Cir. 1986) cert. gr. in part 479 U.S. 983, and aff'd 483 U.S. 143 (1987). There, the court reversed the dismissal of RICO claims alleging obstruction of justice in a suit the plaintiff filed arising out of the termination of his business. The plaintiff filed the second lawsuit based on civil RICO, prior to the trial in his first lawsuit, alleging that defendants engaged in certain acts of obstruction of justice, including intimidating witnesses in the conduct of the original lawsuit. In reinstating his claim, the court stated: "[a] cause of action, of course, is a form of 'property,' and when it arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as "'business injury.'" Id. at 344. The court there went on to state: " Nor do we agree with the district court that because litigants have other potential remedies for obstructive conduct such as that alleged here, there can be no remedy under RICO. We must assume that by including obstruction of justice among the RICO predicate acts, Congress envisioned the statute being used, where all other requirements are met, to supplement remedies already available for such conduct." Id. at 354. (Footnote omitted).

what the plaintiff's claim is and the grounds upon which it rests. Id. at 103.

By contrast, the D.C. Circuit affirmed the district court's dismissal of the bribery allegations for lack of proof, explanation, corroboration, substantiation and evidence, a clear departure from accepted and usual judicial procedures. The D.C. Circuit's affirmance of the district court's ruling conflicts with every authoritative decision of any United States Court of Appeals and of this Court regarding the accepted course of determining a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This Court should grant certiorari and assert its supervisory powers in this case.

B. The Court of Appeals' Affirmance Order Conflicts With The Plain Language of Section 201 and With Pertinent Authority Construing the Statute.

Nevertheless, the panel decision affirmed the district court's conclusion that the First Amended Complaint fails to state a claim for bribery as a predicate act of RICO because "'[i]n support of her bribery allegation, Plaintiff claims only that cost-free legal representation was offered, provided, requested and received in return for influencing or otherwise impacting testimony.'" Pet. App. at A9, (quoting Def's Motion to Dismiss). In affirming the district court, the panel decision conflicts with every authoritative construction of the bribery statute, 18 U.S.C. § 201, including decisions of the Second, Third, Fifth and Sixth and Seventh Circuits.

Such cases have set out the parameters for application of the statute. For the offeror, the offense of bribery is complete upon the offering of or the transfer of the thing of value to the witness. See United States v. Hernandez, 731 F.2d 1147, 1149 (5th Cir. 1984); United States v. Dixon, 658 F.2d 181, 191 (3d Cir. 1981). The crime is complete when the offeror "expresses ability and desire to pay." Hernandez, 731 F.2d at 1149 (quoting United States v. Jacobs, 431 F.2d 754, 760 (2d Cir. 1970), cert. denied 402 U.S. 950 (1971)). Moreover, in United States v. Gorman 807

F.2d 1299 (6th Cir. 1986), cert. denied, 484 U.S. 815 (1987), the Sixth Circuit pointed out that, under section 201, the thing of value need not be money, but the term must be broadly construed to reach all situations in which a public official's or a witness's "judgment concerning his official duties might be clouded by receipt of an item of value given him by reason of his position." Id. at 1304.

Quite simply, the bribery statute and the decisions construing it, forbid compensation of all kinds to any fact witness, except witness fees and reimbursement of expenses as required by law. Hamilton v. General Motors Corp., 490 F.2d 223 (7th Cir. 1973). The Seventh Circuit's decision in Hamilton held that an agreement to compensate a former employee fact witness for testimony in a lawsuit against his former employer was void as against public policy as expressed in 18 U.S.C. § 201. Id. at 227-228. The court there concluded that "the kinds and amounts of reimbursement to which [nonexpert] witnesses are entitled are so severely circumscribed," that the only agreement for reimbursement the law could imply would be for "'reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance.'" Id. at 229 (quoting 18 U.S.C. § 201(j)). The D.C. Circuit's apparent approval of financial arrangements and other agreements by which Respondent Skadden Arps offered ten fact witnesses payment for their sworn testimony conflicts directly with the Seventh Circuit's decision in Hamilton.

Moreover, the district court failed to explain how or under what circumstances providing something of value to a witness with the intent of and in exchange for influencing that witness's testimony under oath can be legal, when section 201 of Title 18 of the United States Code, by its plain language, makes such conduct illegal. The district court cited none of the accepted statutory or case law exceptions to the bribery statute. Its decision thus suffers from the very infirmities it ascribes to the First Amended Complaint: it "provides no statutory or case support for this assumption." Pet. App. at A10. Rather, the district court relied on Respondents' assertion that their payments to and on behalf of third-party witnesses was "common practice." Id. at A11

In raising the bar on considerations under Rule 12(b)(6)

and in failing to articulate either a case or statutory law for its decision, the district court departed from accepted and usual judicial proceedings. The court of appeals, in affirming the district court without opinion sanctioned this departure, requiring this Court to exercise its supervisory powers. Therefore, this Court should grant certiorari.

IV. IN FAILING TO ADDRESS THE APPEARANCE OF IMPROPRIETY RAISED BY DEFENDANTS' EX PARTE COMMUNICATION WITH THE DISTRICT JUDGE'S CHAMBERS, IN WHICH THEY REQUESTED AN ORDER WHICH THE DISTRICT JUDGE THEN FAXED TO DEFENDANTS, THE D.C. CIRCUIT SANCTIONED SUCH AN EGREGIOUS DEPARTURE FROM THE ACCEPTED AND USUAL JUDICIAL PROCEEDINGS THAT IT WARRANTS THIS COURT'S SUPERVISORY INTERVENTION.

Petitioner timely filed the notice of appeal from the district court's dismissal of the case on September 22, 1999. On September 28, 1999 Defendants filed an Affidavit in Support of Attorney Fees. However, this affidavit was not served on petitioner. Rather, Dr. Wallace discovered it in January, 2000 when, in preparing her principle brief on appeal, she reviewed the district court docket entries through the Public Access to Court Electronic Records (PACER) service. She immediately contacted defendant Paul Hastings and requested that a copy be delivered to her. A review of Defendants' belatedly served Affidavit in Support of Attorney Fees and the attached billing records, revealed an entry dated 9/17/98 which stated in part:

> telephone conference with law clerk for Judge Kollar-Kotelly regarding issuance of Order in response to Motion to Stay; office conference with L. Barcella regarding terms of Order issued in response to Motion to Stay; . . .

Rec. on Appeal at 673. The order in question was indeed issued by the district court that same day, September 17, 1998, one day

after Defendants' Motion to Stay was filed. While Petitioner does not know how many persons were involved in the telephone conference, it is clear from the billing entry that the ex parte contact was initiated by the one of the defendants, the law firm of Paul Hastings. Petitioner was never notified of the communication, but belatedly discovered it, just as she discovered that the fee affidavit was filed without serving a copy upon her.

Petitioner raised the issue of an appearance of impropriety in her appeal, requested reversal and remand to a different district judge and an investigation as to the occurrence of actual impropriety. In their Brief, Appellees admitted contacting chambers regarding the order the same day their Motion to Stay was filed, and that the order was faxed to them. The panel decision found no impropriety and no evidence of bias, failing entirely to address the appearance of impropriety issue. Pet. App. at A2-A3.

A. This Court Should Grant Certiorari To Determine If The Ex Parte Communications Violated Petitioner's Due Process Rights and Created An Appearance of Impropriety Requiring Vacatur of the District Court's Judgment and Disqualification of the District Judge.

Section 455(a) of Title 28, the Judiciary Act requires that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1998). In order to act under either the recusal statute, or under a reviewing court's general supervisory power under 28 U.S.C. § 2106, the court "need not find actual bias or prejudice, but only that the facts 'might reasonably cause an objective observer to question [the judge's] impartiality.'" United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988)).

In Liljeberg, this Court set out the considerations for determining whether a judgment should be vacated because of an

appearance of impropriety. It stated:

> [I]t is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

Liljeberg, 486 U.S. at 864 (quoting In re Murchison, 393 U.S. 133, 136 (1955). The Court found vacatur of the district court judgment to be the appropriate remedy, where proceedings were tainted by the appearance of impropriety. 486 U.S. at 868.

In this case, Dr. Wallace discovered the ex parte communications more than a year after they had taken place, and several months after the case was dismissed. Neither the district judge nor the defendants contacted Petitioner at the time of their request. Neither ever disclosed the contact and apparently, neither ever intended to disclose defendants' ex parte request for an order. This failure exacerbates the appearance of bias and raises the question for any objective observer as to the court's impartiality.

In Microsoft, the D.C. Circuit concluded that inappropriate ex parte communications required remand to a different district judge in a case reversed on other grounds. There, as here, the appellants raised the issue of ex parte communications on appeal. The court wrote: "'Ex parte communications are generally disfavored because they conflict with the fundamental precept of our system of justice: a fair hearing requires 'a reasonable opportunity to know the claims of the opposing party and to meet them.'" 56 F.3d 1464 (quoting In re Paradyne Corp., 803 F.2d 604, 612 (11th Cir. 1986) (quoting Morgan v. United States, 304 U.S. 1, 18 (1938))). See also Code of Judicial Conduct for United States Judges, Canon 3(A)(4) (a judge "should neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding") (quoted in Microsoft, 56 F.3d at 1464).

Although the district judge in that case stated that he did

not consider the ex parte submissions, the D.C. Circuit concluded that "the appropriate course would have been simply to refuse to accept any ex parte communications." Id. In this case, Dr. Wallace had no opportunity to address the district judge regarding the communications, because they were kept hidden from her for more than a year. However, because the telephone conference took place immediately after Defendants' Motion for Stay was filed, and because the judge immediately issued the requested order and faxed it to defendant Paul Hastings' offices, facts which Respondents freely admit now, but concealed for fourteen months, it would appear to an objective observer that the judge privately gave preferential treatment to the defendants.

The appearance of improper influence is inescapable — far stronger than in Microsoft. This case raises a prima facie violation of Canon 3(A)(4) of the Judicial Code of Conduct for United States Judges, a prima facie violation of section 455(a) of Title 28 and for the lawyers, a prima facie violation of Rule 3.5(b) of the District of Columbia Rules of Professional Conduct.

The appearance of impropriety is so strong in this case as to raise due process concerns. "The due process clause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.'" Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). The due process clause, therefore, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." Id. (quoting In re Murchison, 349 U.S. 133, 136, (1955)). Yet, in considering Petitioner's appeal, the D.C. Circuit failed to follow its own precedent regarding a party's ex parte communications with the district judge presiding over the party's case and, failed to examine the considerations set out by this Court in Liljeberg and Aetna Life Ins. Co.

Rather, the D.C. Circuit cited Williams v. Phillips Petroleum Co., 23 F.3d 930 (5th Cir. 1994), in support of its conclusion that it found no impropriety or evidence of bias. Pet. App. at A3. In Williams, as here, the appellants raised questions regarding appellees' ex parte contacts with the district judge based on entries in a bill of costs. However, the similarity between the

two cases ends there. Indeed, the D.C. Circuit's decision is in the appeal below is in direct conflict with Williams.

In Williams, the Fifth Circuit found that plaintiffs' counsel lied to the court by misquoting defendants' time entries to make them appear to be inappropriate ex parte contacts with the judge's law clerk when in fact, those phone calls were to the case manager regarding scheduling matters and a discovery conference. Id. at 940. The Fifth Circuit repeatedly asserted that contacting a judge's case manager, as opposed to his law clerk, is permissible and necessary. Further, the court found that appellant's counsel had "attempted to mislead the court by blatantly misrepresenting the record." Id.

By contrast, in this case, Petitioner quoted verbatim from the billing entries. More important, there is no dispute about the facts as Petitioner presented them before the D.C. Circuit. In their Brief below, Respondents admitted to contacting the judge's law clerk, admitted discussing an order in response to the motion they filed the day before and admitted that the judge issued the order the same day they called and then faxed it to them. It is further undisputed that both the district court and Respondents failed to disclose the communication for more than a year, Respondents even failing to serve Petitioner with their fee affidavit.

The D.C. Circuit's reliance on Williams is misplaced, not only because the facts here are sharply different, but also because Williams makes plain the distinction between contacting a case manager as opposed to a judge's law clerk. Most grievous, however, is the court of appeals' complete failure to address the appearance of impropriety question raised before it.

As this Court stated in Liljeberg, "'[t]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.'" 486 U.S. at 869-870 (quoting Public Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451 (1952)). It does not appear so here. The Court of Appeals failed to apply this guiding consideration. The district court's departure from accepted judicial procedure was substantial and egregious and contrary to the D.C. Circuit's instructions in Microsoft, as well as the instructions of the Code of Judicial Conduct for United States Judges. The Court of Appeals

sanctioned this flagrant departure failing to address the appearance of impropriety question put before it. This Court should grant certiorari to exercise its supervisory powers over the lower courts, to determine if Petitioner's due process rights were violated and to evaluate the considerations it has set out in Liljeberg and other pertinent precedent.

CONCLUSION

For all the foregoing reasons, Petitioner, Katherine T. Wallace respectfully requests this honorable Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully Submitted,

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